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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91191536
Party	Defendant McFest LLC
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Attachments	Motion to Set Aside Default and Motion to Extend Time to Answer.pdf (4 pages)(22086 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of:
Application Serial No. 77/511,690
Published in the *Official Gazette*
February 17, 2009

MCFEST LLC,	)	
	)	
Applicant,	)	
	)	
v.	)	Opposition No. 91191536
	)	
McDONALD'S CORPORATION,	)	
	)	
Opposer.	)	
	)	

MOTION TO SET ASIDE ENTRY OF DEFAULT FOR GOOD CAUSE AND MOTION TO EXTEND TIME TO ANSWER

Applicant MCFEST LLC, by its undersigned attorneys, submits herein pursuant to 37 C.F.R. § 2.116(a) and Fed. R. Civ. P. 6(b) and for the reasons set forth below respectfully moves to set aside the entry of default dated October 15, 2009, and moves on the same grounds for leave to file a late Answer within this Opposition proceeding.

MEMORANDUM OF LAW

I. Statement of Facts and Preliminary Statement

Applicant's mark was published for opposition January 20, 2009 and the Opposition followed on August 17, 2009, with a deadline to file an Answer of September 27, 2009. The intervening withdrawal of Applicant's counsel of record occurred on August 6, 2009.

Applicant's failure to comply with the deadline to file an answer was the result of incomplete understanding by Applicant of the Opposition proceeding. Without the advice of counsel, applicant was not fully able to ascertain the consequences of non-compliance with TTAB deadlines. Indeed, until the appearance of this office- effected by the Power of Attorney filed earlier today- Applicant was completely without legal counsel regarding this matter.

II. Legal Argument

In considering whether to open or set aside a default judgment, the TTAB has stated that "[t]he 'good and sufficient cause' standard, in the context of [37 C.F.R. ž 2.132(a)], is equivalent to the 'excusable neglect' standard which would have to be met by any motion under FRCP 6(b) to reopen the plaintiff's testimony period." *HKG Indus., Inc. v. Perma-Pipe Inc.*, 49 USPQ2d 1156, 1157 (T.T.A.B.1998). Thus Applicant's motion to reopen the opposition proceeding is made pursuant to that Rule. In analyzing excusable neglect, the TTAB has relied on the Supreme Court's discussion of excusable neglect in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership,* 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). *See*, e.g., *Mattel, Inc. v. Henson*, 88 Fed. Appx. 401 (Fed. Cir. 2004) (confirming applicability of *Pioneer* factors to TTAB proceedings).

The *Pioneer* case dealt with a bankruptcy rule permitting a late filing if the movant's failure to comply with an earlier deadline 'was the result of excusable neglect.'" 507 U.S. at 382, 113 S.Ct. 1489. The Supreme Court defined the inquiry into excusable neglect as:

> at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 395, 113 S.Ct. 1489. In practice before this Board in particular, the TTAB "is lenient in accepting late-filed answers" when the delay is not excessive. *See, Mattel, Inc. v. Henson*, 88 Fed. Appx. at 401, n.1.

Under the circumstances, the Board has ample reason to employ its leniency and authorize the late filing of an Answer. It is hard to imagine how Opposer could have been prejudiced in the time between September 27, 2009 and now. For the last several years, Applicant's common law marks and Opposer's registered trademark have coexisted, with no objection from Opposer. Applicant does not, however, urge estoppel on this motion (as to the substance of the Opposition). Applicant merely raises this issue to demonstrate that Opposer has not been harmed in any quantum greater than it had already been for the previous several years, by virtue of the delay since the September 27, 2009 deadline, and cannot demonstrate prejudice.

Nor is the length of the delay significant in this context. There is no impact on other pending judicial proceedings. The reason for the delay is fairly characterized as honest error largely out of Applicant's control, because the attorney of record withdrew while Applicant was unaware that any Opposition would be filed. Nor is there any issue of bad faith.

Default judgment is an extreme sanction, and "a weapon of last, not first,

resort." *Martin v. Coughlin*, 895 F. Supp. 39 (N.D.N.Y. 1995). Ultimately, there is no reason in this situation to depart from the well-known preference in the federal courts that litigation disputes by resolved on their merits. *See, Richardson v. Nassau County*, 184 F.R.D. 497, 501 (E.D.N.Y. 1999).

III. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the default entered in the matter be set aside, and that leave be granted to file a late Answer.

LINDA S. MENSCH, P.C.

/ J. Ryan Hinshaw /_____

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